United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1130, 1136, 1202

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOUIS TOLIVER, MARY JEAN ASKEW and
ELGIN C. COOK,
Defendants-Appellants.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE

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Preliminary Statement

On September 12, 1974 an indictment was returned to the court superseding a previous indictment filed December 17, 1973 adding one more defendant and several more counts. With the exception of the appellant, Louis Toliver, who was the added defendant to the new indictment, all pretrial discovery had been completed under the old indictment bearing Docket Number Criminal 1973-382. Various hearings were held on questions of voluntariness and identification procedures. Those hearings were held on January 31, 1975 and April 11, 1975. Those motions to suppress were resolved against the respective co-defendants, including the appellant, Elgin Cook, the only other motion made by Cook, joined by co-defendant George Raspberry, was to dismiss the indictment on the ground that each was placed in double jeopardy by virtue of previous convictions involving a similar unemployment

scheme in Jamestown, New York. That motion was denied by Decision and Order of Judge John T. Curtin dated March 10, 1975.

On August 26, 1975 a speedy trial motion was made by co-defendant Nathaniel Askew and on October 8, 1975 a similar motion was made by the appellant, Mary Jean Askew. On November 4, 1975, Judge Curtin by Decision and Order denied those motions to dismiss and scheduled December 9, 1975 as the trial date.

On that date the government moved to sever co-defendant Cainetta Raspberry because of a terminal illness (37).[1] Prior to commencement of proof, co-defendant, George Raspberry entered a plea of guilty to two counts of the indictment and co-defendant, Rosa Bell McClendon, entered a plea of guilty to three counts of the indictment. Proof then commenced on December 17, 1975 and concluded on January 8, 1976. Because of the intervening holidays the actual trial days numbered are ten.

After the government rested (1093), co-defendant, Kate Lee Cook, moved for judgment of acquittal (1118) which was granted (1127). Mary Jean Askew then moved for a judgment of acquittal on the ground that there was no showing that she used the mails (1129). As part of the motion she argued that Count 21 should be dismissed because there is no proof that she mailed or caused to be mailed to the New York State Department of Labor Form L0406.1 certifying under the false and fictitious name of Terry Mitchell that she was and continued to be unemployed (1138). Toliver made the same arguments with respect to lack of proof of mailing of the Form L0406.1 (1178). Each of those motions were then denied by the court (1188).

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[1] Reference to Trial Transcript.

After counsel for Askew completed his summation (1359), the court took up the question, again, as to the proof of mailing of the Forms L0406.1 (1360). Upon reconsideration, the court decided that since the L0406.1 was an interoffice mailing between the local unemployment office in Buffalo, New York and the office in Albany, New York and there was no indication on the form as to the fact that it would be mailed, he concluded that defendants named in counts charging them with mailing or causing to be mailed that form could not stand (1379). Therefore the court dismissed Counts 21, 24, 28, 47, 49, 54, 62, 66 and 69 (1379). The court then retracted from the indictment each of those counts as well as those portions of the substantive counts and those overt acts set forth in the conspiracy counts relating to the mailing or the causing to be mailed of Forms L0406.1 (1381-1384). Judge Curtin then explained his decision to the jury (1385).

On January 7, 1976 the jury then retired to deliberate on the remaining counts of the indictment and returned on January 8th to resume those deliberations (1513, 1517). After some fourteen hours of deliberation over the two days, the jury returned its verdict (1531-1536).

Of these appellants, Elgin Cook was found guilty in 24 of 25 counts, 19 substantive and 5 conspiratorial. Mary Jean Askew was found guilty on each of the 10 counts submitted to the jury, 7 substantive and 3 conspiratorial. Louis Toliver was found guilty of 18 of the 19 counts submitted to the jury, 13 substantive and 5 conspiratorial.

On February 23, 1976 the court sentenced Elgin Cook to the custody of the Attorney General for a period of four years on each count to run concurrently (1549-1550). On the same day the court sentenced Louis Toliver to the

custody of the Attorney General for a period of five years on some of the counts, a consecutive term of four years on the remainder of the counts and suspended the sentence as to the remainder and placed him on probation for a period of four years (1563-1564). On March 1, 1976 the court sentenced Mary Jean Askew to the custody of the Attorney General for a period of three years on each count to run concurrently (1577-1578).

Each of the defendants timely filed his/her Notice of Appeal.

Statement of Facts

After the pleas by George Raspberry and Rosa Bell McClendon were taken out of the presence of the jury (53), the appellant, Elgin Cook, moved for a mistrial (52-53). The court denied that motion, but told counsel he would instruct the jury that they are not to be concerned with the defendants that were at counsel table at the beginning of jury selection and who are not present at this time (54). The judge then explained the absence of those defendants as well as the absence of Cainetta Raspberry, whose case had been severed (37, 58-59).

The Absence of Askew

Askew first became absent from the trial on December 22, 1975 (508). At that point her counsel stated that there was no real necessity for her to be present. The court asked if she wanted to remain in the court room and her counsel replied that she wanted to go to the hospital. She was then excused by the court (510).

Prior to the testimony of Joseph Ruocco, an employee of Regiscope Distributors, the prosecutor informed the court and Askew that it was anticipated that he would

testify in the afternoon and that his testimony would relate to Askew insofar as he would identify regiscope photographs produced from a check cashing machine maintained by his company at 1242 Jefferson Avenue, Buffalo, New York, which photographs the prosecutor alleged depicted Mary Jean Askew cashing certain checks (652). At that point Judge Curtin stated that unless there was some compelling reason why she should be here, he directed that testimony continue. To that, counsel for Askew replied: "I have no objection to that." (654). Testimony of others then continued and later that afternoon Ruocco did testify (720-730) by identifying regiscope photographs other than those of Askew.

The trial was then adjourned over the Christmas holidays and commenced the following Monday, December 29, 1975. At that time Askew was still in the hospital, having been admitted on December 23, 1975 (764). At this point the government had recalled its witness, Ruocco, from Utica, New York. Askew's counsel objected to the taking of his testimony out of the presence of his client (765); however, the court ruled that since the testimony was very technical in nature and since he was not identifying Askew as a person cashing checks, his testimony should be permitted (766). He then continued his testimony regarding the regiscope photographs (775-783).

When the trial resumed the following morning, her counsel objected to continuing in her absence (897). On that day, Hugh L. Sang, a handwriting expert and the government's key witness arrived from New York, New York to testify. Later that day, while Askew was still absent, and over counsel's objection, the court ruled that the jury would hear Sang's direct testimony relating to Askew (1003-1005).

At the conclusion of his testimony, Askew moved for a mistrial based upon her absence (1059). The court denied the motion and suggested to counsel that he order the trankcript of Sang's testimony and that was done (1079). Sang was then recalled for cross-examination and he was so examined by counsel (1080). At no time did Askew ever request that Ruocco be recalled as a witness.

The Proof

By virtue of the pleas of co-defendants George Raspberry and Rosa Bell McClendon, proof relating to Counts 30-35 of the indictment (Cook App. A34-A40) were eliminated. Those counts related to a scheme to defraud and a conspiracy to defraud the New York State Department of Labor by use of the mails in obtaining unemployment checks by virtue of false claims of employment against Pat's Pad and Lounge and Harlan's Delicatessen.

The remaining counts of the indictment, for which proof was offered, related to conspiring to use the mails to defraud and use of the mails in a scheme to defraud the State of New York of unemployment insurance benefits by the filing of false claims for employment against the Cook and Green Car Wash, the first 12 counts of the indictment; Cook Auto Care, Counts 13-29; Steel City Collision, Counts 36-50; Bee Gee Arco Service Station, Counts 51-57; Almasi's Tavern, Counts 58-63; Charlies Sunoco Station, Counts 64-67; and Dixon's Sunoco Station, Counts 68-70; and Count 71 charging the appellant, Elgin C. Cook, alone, with using false and fictitious names to further the scheme to defraud.

In each of the six conspiracies to use the mails to defraud, Elgin Cook was named in all but the one involving

Almasi's Tavern. Mary Jean Askew was involved in one with Cook alone, two with Cook and Louis Toliver and one with Toliver alone. Toliver was charged in five conspiracies, one with Cook and Askew, three with Elgin Cook and one with Askew alone. Each of these counts also involved co-defendants not before this court.

George Raspberry testified that he first met Elgin Cook in the fall of 1971 (789). He said he knew his wife, Cainetta, never worked for him but he knew that she was receiving checks (790). He also said that he received New York State unemployment checks in the name of J. Carter at his home on Northampton which he turned over to Cook and similar checks addressed to P. A. Green at his address which he also turned over to Elgin Cook (791-792). By handwriting analysis the Green check was endorsed by Mary Jean Askew.

He testified about going to different places such as Harlan's Delicatessen, Pat's Pad and Lounge and Steel City Collision with Elgin Cook and that Cook wrote down the New York State Unemployment Registration Certificate Number of those places (791-800). He also testified that he received mail from the Bee Gee Arco Service Station which he delivered to Elgin Cook; that he received various unemployment checks in the name of J. M. Clark at his Northampton Street home that he also delivered to Cook (803-808). He also said there came a time when he and Elgin Cook went to the New York State Unemployment office in Buffalo, New York where Cook told an investigator "To quit harassing his mother or he would give the scheme to every prostitute and junkie in Buffalo" (811). He also testified that he knows Rosa Bell McClendon and Mary Jean Askew (812-813). He lastly testified that for each unemployment insurance claim he filed he gave Elgin Cook $250.00 (813).

Otis Pender testified that he knew both Elgin Cook and Rosa Bell McClendon and that during the summer of 1972 he was with them when Cook drove to the unemployment office in Lackawanna, New York. He said that when McClendon got out of the car to go to the unemployment office she reached above the visor and took about five unemployment books and that on the way back to the unemployment office they stopped at the bank on Seneca and Emslie Street and that Cook went inside the bank to cash unemployment checks (750-752). He further testified that at a later time that summer he was with Cook and McClendon again when they went to the unemployment office and on this occasion he observed about a half-dozen unemployment booklets in Cook's glove compartment (754).

Willie Middleton testified that he knew Mary Jean Askew and her boys, Nathaniel and Robert, and that she was the sister of Elgin Cook (339-342). He also testified that he lived at 368 High Street, one of the addresses used by Askew in making a claim for unemployment benefits in the name of Willie S. Middleton.

The balance of the proof relates to each of the individual "businesses" involved.

1. Cook and Green Car Wash

This car wash located at 18 Eagan Drive, Lackawanna, New York discontinued business in November or December, 1969 (643-653, 369). Despite that, Mary Jean Askew, using the false and fictitious names of Kathryn Lee Willis and Willie S. Middleton made unemployment insurance claims alleging that she worked for the car wash, as did Nathaniel and Robert Askew. The claim was that work was performed there between about January 1970 and

January 1971 (319-328, 365-378, 652-658). The names Willis and Middleton appearing as signatures on the Forms L0330 were written by Askew and the L012.11s verifying the employment were done by Elgin Cook, and he himself made a claim using the fictitious name of Raymond Briggs. In the normal course of events and in 99.99 per cent of the time the L012.11s are mailed (120-129) and the checks sent from Albany are always mailed (85-92).

2. Cook Auto Care

Though there was never any car wash in existence at the address used for Cook Auto Care, namely, 83 Brunswick Blvd., Buffalo, New York 203-206, 287-290), claims were made and the State of New York issued unemployment checks. As in the case involving Cook and Green Car Wash, Elgin Cook signed all the Employment Verification Forms (L012.11). Cook himself made claims in the name of Jean Carter and Lynn F. Carter and he verified the employment of Askew and used the names Johnnie L. Jones, Terry Mitchell, Jerry L. Smith and Mary J. Smith and Toliver made claims using the name of Terry Cole and Cook verified that employment.

When Cook filed his unemployment insurance claim in the name of Lynn Carter he utilized Louis Toliver's address on 307 Johnson Street, Buffalo, New York (490-494). One of the Lynn Carter checks was second endorsed by Mary Jean Askew under the false and fictitious name of T. L. Mitchell.

In addition to the L012.11s being mailed, checks were issued to each of the fictitious claimants and were cashed.

3. Steel City Collision

Eugene Skrzypek testified that he operate an automotive repair shop known as Steel City Collision but that he never employed anybody by the name of Freddie Jackson, Louis Rice, Richard Rice, Bill Brown or Sylvester Crooks. He examined each of the L012.11s which contained the signature "Eugene Skrzypek" and said that that was not his signature (366-368). He also testified that he never operated his business at either 433 Johnson Street or 1202 Michigan Avenue which were the addresses used on the claim forms as the address for his business (371-372).

One of the claims upon Steel City Collision was made by Elgin Cook using the false and fictitious name of Sylvester Crooks. Checks issued to S. Crooks at 183 Northampton Street, Buffalo, New York, the residence of George Raspberry who testified that he gave those checks to Elgin Cook. Two of those checks were second endorsed by Mary Jean Askew in the name of T. L. Mitchell. Toliver also made unemployment insurance claims using the names Louis Rice and Richard Rice. Toliver was also identified by Robert Mack, Assistant Manager of the Marine Midland Bank in Niagara Falls, as the casher of eight of the Richard Rice checks (713-716).

In addition, co-defendant George Raspberry made claims, as he testified, in the names of Bill Brown and James Turner and that with respect to those he paid Elgin Cook $250.00 each.

4. Bee Gee Arco Service Station

Leonard Walentynowicz testified that he is the owner and operator of Bee Gee Arco Service Station located at 808 Fillmore Avenue, Buffalo, New York. He testified that he never employed anyone by the names of Willie M.

Davis, Johnnie Gray, Leroy Jefferson, James E. Willis, Robert J. Owens or John T. Toliver and that he never operated his gas station at 183 Northampton Street. He further observed all the forms L012.11 and testified that the signature of Frederick Walentynowicz appearing thereon was not his (392-402).

Despite that Cook, Toliver and Raspberry used the various fictitious names claiming that they worked there and Elgin Cook verified the employment and checks were issued and cashed.

5. Almasi's Tavern

The same situation obtains here, Mary Jean Askew and Louis Toliver made claims using false and fictitious names and received unemployment benefits checks thereby. The periods of time the claimants alleged they worked and the day of the filing of the claims were all subsequent to the death of the tavern's owner, Stephen Almasi, although his signature appears on the L012.11s as verifying the employment of Margaret Askew and Louis Clyburn, names used by Askew and Toliver, respectively.

6. Charlie's Sunoco Service Station

Unemployment insurance claims were filed with the State of New York showing employment with Charlie's Sunoco Service Station by individuals named Elgin Cook, Edward C. Cook, Terry Mitchell, Johnnie M. Clark and James Cole. The testimony of Nicholas Kapsuris, the accountant for that business, was that none of those individuals were ever employed by the Service Station, nor was the service station ever operated at 387 Woodlawn Avenue or 271 Southampton, which were addressed used as the "business" addresses. Those addresses were, at one time or another, the residence of Rosa Bell McClendon, the co-defendant.

Elgin Cook made a claim in his own name as well as in the name of Edward Cook. One of the checks issued to E. C. Cook was second endorsed by Toliver using the name T. L. Mitchell and one of the T. L. Mitchell checks which by handwriting analysis was cashed by Louis Toliver contained a Bethlehem Steel Badge No. assigned to Elgin Cook. Several of the checks issued to T. L. Mitchell, again, by handwriting, were endorsed by Louis Toliver and second endorsed by Elgin Cook using the names Jean Carter or Lynn Carter.

An unemployment insurance claim, L0330, in the name of Johnnie M. Clark was handprinted by Elgin Cook and signed by Louis Toliver and checks thereafter issued in that name addressed to 183 Northampton, the residence of George Raspberry. Louis Toliver also filed unemployment insurance claims under the names of James Cole and checks in that name were mailed and cashed.

On each of these claims the form was either handprinted or signed by Elgin Cook.

7. Dickson's Sunoco Station

Unemployment insurance claims in the name of Jim Hooker, Arthur Ward, Carl Collier and Terry Rogers were filed with the State of New York showing employment by Dickson's Sunoco despite the fact that Jimmy Dickson testified that none of those individuals ever worked for him, nor did he ever operate his gas station at 387 Woodlawn or 156 Northampton, addresses used as the addresses of the "business" (417-422). The addresses utilized were the residence respectively of Rosa Bell McClendon and George Raspberry.

The claim filed under the name of Jim Hooker was handprinted by Elgin Cook; the claim filed under the

name of Carl Collier was signed by Elgin Cook; likewise, the claim filed under the name of Arthur L. Ward was handprinted by Elgin C. Cook. The claim in the name of Terry Rogers was handprinted by Louis Toliver. As a result the State of New York issued checks in those names to the addresses indicated and those checks were all cashed.

POINT I

The entry of guilty pleas subsequent to jury selection and prior to the government's proof, out of the presence of the jury, did not constitute error.

Elgin Cook advances the argument that Judge Curtin failed to give proper cautionary instructions to the jury when the panel returned to hear the evidence in the case and that resulted in substantial prejudice to his client calling for reversal of his conviction. He further asserts that this failure to properly instruct was compounded when the co-defendant, George Raspberry, was allowed to testify for the government in a later point in the trial.

There can be no question that the taking of guilty pleas during the course of a trial are entirely proper and result in no prejudice to the remaining defendants. Indeed, the record of the proceedings below establish that Judge Curtin took more than adequate steps to assure that no prejudice arose as a consequence of the guilty pleas.

The only case cited by Cook where prejudice was found to exist as a result of a guilty plea taken during the course of the trial is *Payton v. United States,* 222 F.2d 794 (D.C. Cir. 1955); however, there, the trial court allowed the plea to be taken in the presence of the jury and subsequently called attention to the plea during the taking of

the evidence and during the giving of the charge to the jury. That court relied upon *United States v. Hall,* 178 F.2d 853 (2d Cir. 1950) in support of its conclusion. In *Hall,* the trial court's instruction to the jury that it was to consider the guilty plea of one defendant as evidence of the guilt of the remaining defendant was held prejudicial. See 178 F.2d at 853n.1.

The situation here is quite to the contrary. Cook concedes that the plea was taken in the absence of the jury and, in addition, the trial judge never indicated that the pleas of the two co-defendants could be used as any evidence of the guilt of the remaining defendants. Prior to the commencement of proof, he advised the jury (58-59):

> There are two other defendants who are not with us now, George Raspberry and Rosa Bell McClendon. Those cases, the problems involved in those cases, are not an issue before you. We have the other defendants in the case and you are to zero in on the facts and the law as to those other defendants so that the fact that Rosa Bell McClendon and George Raspberry are not here is not to enter into your thoughts or suggestions one way or the other . . .

Certainly, pleas of guilty are a common occurrence during the course of a criminal trial involving multiple defendants. This Circuit has recognized, *United States v. Kelly,* 349 F.2d 720, 767 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966):

> In the natural course of events, guilty pleas during joint trials are to be anticipated. At least they can not be avoided. It is the plain duty of the presiding judge to do nothing to increase the possibility of prejudice to the remaining defendants.

Judge Curtin did everything to eliminate any potential prejudice to the remaining defendants. "Of course, in any

multi-defendant trial there is a real danger that the admission of guilt by one defendant, particularly in a conspiracy case or one in which the defendants have acted jointly, will react unfavorably against the other defendants. However, no rule of law has yet been promulgated which would forbid the defendant from so pleading during trial." *United States v. Dardi*, 330 F.2d 316, 333 (2d Cir. 1964), *cert. denied*, 379 U.S. 845 (1964), rehearing denied, *sub nom., Rosenthal v. United States*, 379 U.S. 986 (1965).

In addition to his instruction prior to commencement of proof, the judge, prior to summations, instructed the jury that:

> . . . you will note that the defendant Kate Cook is no longer here. That is because of the counts, I believe two, which were pending against her I have dismissed because I found that there was not sufficient evidence to charge you under the law. Whatever happened to her, certainly, or to George Raspberry or to Rosa Bell McClendon or Cainetta Raspberry, those defendants are not before you for your consideration and certainly it is common sense to understand that in any trial there may be good evidence against one defendant and not good evidence against another, so it has nothing to do with the guilt or innocence of any of the other defendants in this case, the fact that they are no longer here. (1226).

And in his charge, he further explained the Raspberry plea and testimony by advising the jury (1470-71):

> Mr. Raspberry explained to you that he has pled guilty in the case and that he is awaiting sentence and the judgment about whether or not what the court might do on sentence was a factor in his mind at all in coloring his testimony one way or another is for you to determine, but these are considerations which you should think about when you are weighing the

> testimony of all the witnesses in the case and as far as the special position of Mr. Raspberry is in in weighing his particular testimony.

As a matter of fact, in *United States v. Price*, 447 F.2d 23 (2d Cir. 1971), *cert. denied*, 404 U.S. 912 (1971), factually similar insofar as the taking of the plea was concerned, this court, in affirming the conviction and instructions of the same trial judge remarked:

> Appellants can hardly complain that Judge Curtin should have cautioned the jury at the beginning of the trial for he asked counsel whether they wanted to say anything and they stood moot. Both in his opening statement and in his charge to the jury, Judge Curtin cautioned that the testimony of accomplices should be given especially close and searching scrutiny and that the jury should consider "any demonstrated hope of leniency or reward to be gained through testifying" (Citing *Kelly, supra)* 447 F 2d 23, 30.

So here, when the court imposed its initial cautionary instruction to the jury and asked counsel if this is what they desired (54), counsel for Cook said, "Yes, your Honor" (54).

POINT II

Continuance of the trial in the absence of Mary Jean Askew did not constitute error.

While it is true that neither Askew individually nor through her counsel ever waived her presence at the trial, it is significant that counsel's motion for a mistrial was only directed to the question of whether or not Askew had ever been denied her right to confront witnesses against her (Askew brief at 7-8).

In support of her claim that she was prejudiced as a result of her absence during the testimony of the government's witnesses, Ruocco and Sang, two of the three cases she relies upon deal with the right of confrontation in the context of jury selection. See *Lewis v. United States,* 146 U.S. 370 (1892) (defendant not allowed to view jurors being challenged); *United States v. Crutcher,* 405 F.2d 239 (2d Cir. 1968), *cert. denied,* 394 U.S. 908 (defendant absent while jury was impaneled). So that, at least in those cases, the only possible means of correcting such a defect would have been for the trial court to have ordered the selection of a new jury. However, in the instant case, the taking of the testimony of Ruocco and Sang in Askew's absence was subject to correction upon her return, that is, by giving her a later opportunity to cross-examine. While counsel requested that Sang be recalled, he never requested Ruocco's recall.

As far as the latter's testimony is concerned, he never linked Askew with the commission of a crime or testified regarding her criminal activity. As the prosecutor stated (765-766):

> The testimony itself will not be such as it will connect the defendant Mary Jean Askew to the photographs. The individual testifying is an employee of Regiscope Distributors. Regiscope Distributors maintains these cameras in various different locations, the purpose of which is to take a split picture of the person cashing the check and he will simply identify them as such as coming from the films and the cameras that they maintained, and that is all.

The court having heard his previous testimony relating to other defendants (720-730) found that his testimony was very technical in nature and since he was not identifying Askew as the person cashing checks, his testimony

should be permitted (766). And the court instructed the jury that they were not to make any adverse inferences from her lack of appearance. He told the jury (776):

> I might say that Mrs. Askew is not here this morning and she is specifically excused so that certainly the fact that she is not here is not to be taken against her interest in any way by you. She wanted to be here, but for health reasons, she could not be and, therefore, I felt it best that we continue without her and we will now hear testimony from Mr. Ruocco.

Counsel then cross-examined Ruocco as did other counsel when he testified previously. Here, it is significant that in a previous trial wherein she was convicted of perjury arising out of these same transactions (Askew brief p. 2) the same photographs were entered into evidence based upon the testimony of Ruocco. In fact, his prior federal court testimony was part of the 3500 material which was given to counsel at the time of jury selection which was one week prior to the start of proof (35, Court Ex. 61). Further, the photographs themselves (Gov. Exs. 24-33) were given to counsel at least a year and one-half prior to trial as part of the discovery proceedings.

As to the testimony of Sang, the handwriting expert, the government concedes he was the key witness against Askew as well as her co-defendants; however, following counsel's cross-examination of him in the absence of his client, and over the long weekend between December 30, 1975 and January 5, 1976, counsel was provided with the transcript of Sang's testimony (1079). Sang was then recalled in Askew's presence for cross-examination (1080). Additionally, as part of pretrial discovery, counsel had the full report of Sang as well as all the documents analyzed by him. And, over and above that, he had the testimony of Sang as 3500 material from the previous Askew trial referred to hereinabove (34, Court Ex. 51).

Moreover, it is submitted that the trial court properly took into consideration in deciding to proceed with the testimony of Ruocco and Sang that this was a long, complex trial wherein the proof relating to each co-defendant was identical. There were six co-defendants, 71 counts in the indictment and over 550 government exhibits. Under these circumstances, it is submitted that Askew suffered no prejudice because her presence would have been no aid to her defense.

While the court in *Ellis v. Oklahoma,* 430 F.2d 1352 (10th Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971), said that actual prejudice is presumed when a defendant is absent from a critical stage of the proceedings, the court also found in that case that the defendant suffered no prejudice. There *Ellis* relied upon *Jones v. United States,* 299 F.2d 661 (10th Cir. 1962), *cert. denied,* 371 U.S. 864, another case where the question of prejudice due to an absence of the defendant arose where all the testimony had been received. Jones also found no prejudice, stating that:

> Appellant's presence would have been no aid to his defense and it is apparent that he suffered no prejudice. 299 F.2d at 662.

The *Jones/Ellis* type test for determining prejudice is apparently limited to the facts of those cases. As this court said in *Crutcher, supra* at 244:

> It is true that as a general rule a violation of Rule 43 does not require reversal if the record affirmatively indicates beyond a reasonable doubt that the error did not effect the verdict[2] [citing *inter alia Jones, supra*] but the case in supporting the rule involved communications in the absence of the defendant between the court and jury after deliberations had begun.

Similarly, a subsequent 10th Circuit case, *United States v. Baca*, 494 F.2d 424 (1974) (Askew brief at 11-12), considering *Ellis* and *Jones*, observed:

> Deprivation of defendant's right to be present at every stage of the trial is subject to the harmless error rule and exchanges between judge and jurors will not constitute reversible error lacking showing of clear prejudice to the absent defendant. 494 F.2d at 428.

Other Circuits have also found a lack of prejudice during the absence of a defendant during certain stages of a trial. *Peterson v. United States*, 411 F.2d 1074, 1080 (8th Cir. 1969), *cert. denied*, 396 U.S. 920; *Estes v. United States*, 335 F.2d 609, 618 (5th Cir. 1964); *cf. Crutcher, supra*, at 244. The Seventh Circuit, *United States v. Davis*, 486 F.2d 725 (1973), *cert. denied*, 415 U.S. 979, found prejudice lacking where the defendant was absent during the testimony of an important witness where, despite his absence, his attorney cross-examined that witness. See also *United States v. Clark*, 475 F.2d 240, 247 (2d Cir. 1973) (suggestion that cross-examination is key factor in determination of prejudice as a consequence of defendant's absence from suppression hearing).

In further determining whether or not prejudice exists, this Circuit has taken into consideration the number of defendants and the duplicity of the evidence should there be a second trial. In *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972), *cert. denied, sub nom., Santoro v. United States*, 409 U.S. 1063, the court said:

> Whether the trial will proceed will depend upon the trial judge's determination of a couple of issues. He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the government in having to

> undertake two trials, again particularly in multiple-defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the government's witnesses in substantial jeopardy. at 1210.

Clearly, Judge Curtin took all these factors into consideration in ruling that the trial proceed in Askew's absence, albeit necessitated by her apparent illness. And such continuance in no way prejudiced her right to be present. As the court said in *Peterson v. U.S., supra,* at 1080: "Thus, if no prejudice to a defendant's substantial rights resulted from his absence at a stage of the proceedings, the courts will not overturn his conviction." Here, the presence of Askew had no reasonably substantial relationship to the opportunity to defend *Stein v. Massachusetts,* 313 F.2d 518, 522 (9th Cir. 1962). In other words only where there is any reasonable possibility of prejudice from defendant's absence at any stage of the proceeding should a conviction be reversed. *Estes v. U.S., supra; Jones v. U.S., supra.*

POINT III

The proof showed that the mails were used and that such use was an integral part of the scheme to defraud the State of New York.

A. Evidence that the checks were mailed is undisputed.

As explained by William Julius, a representative of the New York State Department of Labor, an unemployed person must report to an unemployment office in his local area to apply for benefits. At the time of his initial appearance he is provided with a form L0330 (original Claim for Benefits) which he completes, showing among other things, his name and address and the name and

address of his employer. If the office finds that he meets certain eligibility and entitlement standards, the office mails to the employer a form L012.11 (Request for Employment and Wage Data) to the address provided by the claimant on the Form L0330. The L012.11 is then returned by mail by the employer to the issuing local unemployment office. If the local unemployment office determines that the claimant is eligible for benefits he is called in and signs and continues to sign on a weekly basis a Form L0406 (Claim for Benefit Payment) which is mailed from the local office to the Albany, New York office. At Albany a check is issued and mailed to the claimant. This process is repeated on a weekly basis for as long as the claimant is entitled to benefits (85-92).

With respect to each such claimant that made a claim for unemployment insurance benefits, the New York State Department of Labor file folder was introduced into evidence as a normal business record (94-95). Those file folders contain all the documents relating to the filing of the claim and payment of benefits (*e.g.*, Gov. Ex. 1). As an example of the proof of the mailing of checks to Mary Jean Askew, Julius identified a file folder relating to a claimant by the name of Kathryn Lee Willis. That file folder contained a Form L0330 showing her address to be 368 High Street and the employer to be Cook and Green Car Wash, 83 Brunswick Blvd., Buffalo, New York (Gov. Ex. 2). That file folder also contained the L012.11 showing the employment of a Kathryn L. Willis with the Cook and Green Car Wash signed by co-defendant, Elgin C. Cook (Gov. Ex. 3). That file folder also contains a ledger showing the issuance of checks by mail to the claimant. In this case, the ledger showed that 52 checks were mailed to K. L. Willis, 83 Brunswick Blvd., Buffalo, New York. That file also contained a form showing that subsequent

to the filing of the original claim the claimant changed her address to 83 Brunswick Blvd. That file also contained 52 canceled checks indicating that all those checks were cashed (95-100).

Insofar as the proof of receipt of those checks is concerned, first, the rule is well settled that proof that a letter which is mailed according to direction thereon creates a presumption that it reach its destination in the usual time and was received by the person to whom it was addressed. *Hagner v. United States*, 285 U.S. 427, 430 (1931); *U.S. v. Dondich*, 506 F2d 1009 (9th Cir. 1974). Over and above that, the proof showed that Mary Jean Askew owned and lived at 83 Brunswick Blvd. (203-207); that the Form L0330 was printed and signed by Askew (1030); the pay orders were signed by her; and the checks endorsed Kathryn L. Willis, Kathryn Willis and K. L. Willis were written by Askew; in addition, the regiscope photographs (Gov. Exs. 24-33) depict Askew (at least its the government's contention that the black female depicted in the regiscope is Askew and presumably the jury so thought) cashing ten K. L. Willis checks.

As an example of the proof of mailing of checks to Louis Toliver, the record shows that, for example, Gov. Ex. 166, a Labor Department file folder for one Terry Cole, address 307 Johnson Street, Buffalo, New York, containing the same documents as in the Willis file folder also shows that 31 checks in the amount of $75.00 were mailed to T. Cole at that address between January 2, 1972 and July 30, 1972 (424-428). Similarly, the proof showed that that address was the residence of Louis Toliver (490-494). The proof also showed that each of those checks were cashed and the endorsement Terry Cole or T. Cole was written by Louis Toliver (969), one such check being the subject matter of the regiscope photograph (720-730).

In other words, the jury could do more than simply draw the inference based upon the customary course of events that were probably followed in each specific instance, which is really sufficient, *United States v. Dondich, supra,* it had testimony that each of the checks was actually mailed to the claimant at the address he so indicated in his claim for benefits.

The evidence is equally clear that the L0406s were mailed from the local New York State Unemployment Office to the Albany Office The only possible question that could be raised with respect to the mailings relates to the Forms L012.11 and there the testimony was that it is the normal and usual procedure to have it mailed back (128) and that the form is mailed back to the local office 99.99 per cent of the time (129).

B. Use of the mails was an integral part of the scheme.

Since the scheme did not come to fruition until such time as the defendants received the checks and since the scheme could not have been carried out unless the mails were used, it can hardly be said that the use of the mail was simply incidental to the scheme.

The holding in *United States v. Maze,* 414 U.S. 395 (1974), was that there must be a showing that the mailings were sufficiently related to the scheme and that they were an integral part of the scheme as opposed to incidental thereto. In holding that the defendant's conduct did not fall within the purview of the Mail Fraud Statute, the court said:

> Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss. At 402.

There, *Maze's* scheme came to fruition when he successfully charged his motel bills with stolen credit cards. While he "caused" the various motels to forward charge slips to the credit company, it hardly aided him in his scheme and, in fact, his chance of apprehension would have been enhanced had no mailings occurred. In *United States v. Wolfish*, 525 F.2d 427 (2d Cir. 1975), this court viewed the mailing of insurance claim forms and checks as actually implementing the plan of bringing it to fruition. See also *United States v. Calvert*, 523 F.2d 895, 904 (8th Cir. 1975) finding *Maze* inapposite since the mailings had occurred before the scheme reached its hoped for fruition. To the same effect see *United States v. Marando*, 504 F.2d 126, 129 (2d Cir.), *cert. denied, sub nom. Berardelli v. United States*, 419 U.S. 1000 (1974).

POINT IV

Proof of appellants' guilt was otherwise sufficient.

In addition to being charged with devising and intending to devise a scheme, Askew and Toliver, as well as their co-defendants, were also charged with aiding and abetting and furthering the scheme in violation of Title 18, United States Code, Section 2. So the fact that neither Askew nor Toliver were the "architects" of the scheme does not mean that the proof of their involvement is fatally defective. There is no question the proof showed, according to George Raspberry, that he and Elgin Cook were the sole architects of the scheme alleged in the indictment (612). A fair reading of Raspberry's testimony (786-819) would easily lead one to believe that he was puffing somewhat and that the sole architect was Elgin C. Cook. Nevertheless, as this court said in *Kaplan v. United States*, 18 F.2d 939, 943 (2d Cir. 1927):

> . . . we have pointed out, it was not essential to establish that the plaintiffs in error in this class were parties to the formation of the scheme, if they knowingly joined it. If they did so, they are as responsible as if they had joined it at the time of its formation.

To the same effect see: *United States v. Finkelstein,* 526 F.2d 517 (2d Cir. 1975); *Boyd v. United States,* 96 F.2d 734, 741 (6th Cir.), cert. denied, 305 U.S. 608 (1938); *Alexander v. United States,* 95 F.2d 873, 880 (8th Cir.), *cert. denied,* 305 U.S. 607 (1938). See also *United States v. Greenberg,* .... F.2d ...., Slip Op. 3263 (2d Cir. April 19, 1976).

Certainly as set forth in the Statement of Facts, the proof of the involvement of Askew and Toliver is ample. The real question is whether or not the joinder of these defendants was permissible and whether the proof adduced demonstrated that the separate conspiracy counts were duplicitous and if so, if that constituted a fatal variance.

POINT V

Even if duplicitous conspiracies were proved, the variance was not fatal.

As an initial matter, the appellee asserts that the joinder of these appellants and other co-defendants was proper under Rule 8 of the Federal Rules of Criminal Procedure. Each mail fraud count and each conspiracy count associated with the mail fraud count charges, and the proof showed, that the appellants and other co-defendants, within the same time period, made false and fraudulent claims for unemployment insurance benefits and received checks which they endorsed and cashed. Of the ten counts

upon which Askew was convicted, she was involved with both Cook and Toliver in two of them, with Cook in four and with Toliver in four. Of the 18 counts upon which Toliver was convicted, he was involved with Askew in four and Cook in seven. Indeed, the lack of prejudice is amply demonstrated by the fact that none of the appellants have ever moved for a severance despite the fact that there was complete pretrial discovery at an early stage, nor did either of them ever make such claim during the course of the trial, nor did either of them ever claim surprise or inability to prepare a defense because of the joinder of the defendants in this indictment. In *United States v. Del Purgatorio,* 411 F.2d 84 (2d Cir. 1969), this court recognized that failure of a defendant in a conspiracy prosecution to object to an alleged misjoinder at the trial level was barred from raising the issue for the first time on appeal:

> Furthermore, no objection to joinder was made below and such an objection on appeal is foreclosed. 411 F.2d 87.

A case similar in factual posture finding no prejudicial misjoinder under Rule 8 was *United States v. Cohen,* 145 F.2d 82 (2d Cir.), *cert. denied,* 323 U.S. 799 (1944). There, 27 defendants were indicted for mail fraud and a conspiracy to use the mails to defraud involving more than 200 separate transactions. While the conspiracy count involved all the defendants, the 29 substantive mail fraud counts involved different combinations of defendants. One group operated in Boston, Massachusetts and the other in New York, New York. There was evidence that certain defendants worked for both groups at various times although all the defendants did not know each other. Indeed, the relationship between the two groups was somewhat tenuous as the court found; however, in finding no prejudicial error, the court stated that:

> [T]here was evidence of at least a constant interchange between the two 'schemes' and the similarities of the devises adopted . . . At 88.

And in countering the fact that not all the defendants were involved in each transaction, the court further observed that:

> It was enough if the transaction itself was within the general scope of a 'scheme' on which all had embarked; those not immediately concerned in any particular fraud, would nonetheless be liable, so long as that fraud was within the time in which all had agreed. At 90.

The government agrees that the proof showed that Elgin Cook was the hub of the wheel and that the others were merely the spokes, but it submits, however, that it proved the rim connecting up those spokes. See *Kotteakos v. United States,* 328 U.S. 750 (1946). In other words, here, the spoke participants could be found to be members along with the core conspirator by virtue of the fact that the 'spokes' knew or had reason to know of the existence although not necessarily the identity of one or more of the other spoke participants in the wheel conspiracy. *United States v. Manarite,* 448 F.2d 583 (2d Cir.), *cert. denied,* 404 U.S. 947 (1971).

However, even if the proof established two or more conspiracies in each conspiracy charge, the question is whether or not the variance affects substantial rights of any of the appellants. Federal Rules of Criminal Procedure 52(a). *United States v. Sir Kue Chin,* .... F.2d ...., Slip Op. 3361 (2d Cir. decided April 21, 1976). In other words, even if more conspiracies were proven, they could have been properly joined in the same indictment in any event since the offenses charged are the same or of similar character and are based upon the same or similar transactions.

Though hindsight is always twenty-twenty, to avoid the proscriptions of *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), the government charged a separate conspiracy for each such "business". While prejudice caused by a variance can take many forms, the concern is as to any spill-over effect or the transference of guilt from members of one conspiracy to members of another. *Kotteakos, supra* at 774. Indeed, as this court said in *Bertolotti, supra*, it is generally conceded that the possibility of prejudice resulting from a variance increases with the number of defendants tried and the number of conspiracies proven. See *Bloomenthal v. United States*, 332 U.S. 539 (1947).

The major distinguishing factor between the Supreme Court's finding of no prejudice in *United States v. Berger*, 295 U.S. 78 (1935) and the contrary conclusion in *Kotteakos* was the difference in the number of defendants and conspiracies. *Berger* involved only four defendants. *Bertolotti* involved 29 defendants and 31 un-indicted co-conspirators. Actually it is similar to *Kotteakos* where 32 persons were indicted and four were named as un-indicated co-conspirators. It is submitted that in determining the line separating prejudicial and harmless variance, the instant case falls on the *Berger* side where the variance was harmless. See *United States v. Miley*, 513 F.2d 1191 (2d Cir. 1975). There, this court found that the variance between the indictment and proof prejudiced no defendant. Nine persons were indicted and only five proceeded to trial. Also in that case the crimes of the various appellants were not markedly different. Similarly, in the instant case, only nine persons were indicted and only six proceeded to trial and the crimes were markedly similar, in fact, identical.

Another factor in finding that the instant case falls on the *Berger* side of the line is the fact that the involvement

of these appellants, as well as the other co-defendants, overlaps in more than one of the proven conspiracies. See *United States* v. *Bertolotti, supra.*

In determining whether or not a variance "affects the substantial rights" of the accused:

> The general rule that allegations proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed of the charges against him so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at trial, and (2) that he may be protected against another prosecution for the same offense. *Berger* at 82.

As indicated above, there has never been a claim by either of the appellants that they were unable to frame a defense, that they were unfairly surprised at trial or that they would face double jeopardy problems in the event of a conviction.

To avoid any "spill-over" effect, Judge Curtin properly instructed the jury to reach a verdict as to each defendant upon each count (1452). Farther along in the charge he again told them that they must consider each defendant separately (1456-58, 1497). Even prior to his charge, he cautioned the jury that:

> You must keep in mind that the guilt or innocence of each defendant must be determined separately. The mere fact that they were all tried together is certainly not to be considered as any evidence as to any one of them. You must weigh the evidence as to each and every defendant and as to each and every count and if you find that the government failed as to any defendant or as to any count, then your verdicts are to that defendant and as to that count must be not guilty (1227).

See *United States v. Agueci*, 310 F.2d 817 (2d Cir.), *cert. denied*, 372 U.S. 959 (1963).

As a final matter, relative to the lack of any spill-over effect, the judge commenting at the time of the sentence of Toliver said:

> I might say it appeared to me clearly also that the jury verdict was the correct one. That he was certainly convicted beyond a reasonable doubt after very careful analysis by the jury (1562-1563).

Conclusion.

For all the reasons set forth above, it is respectfully submitted that the Judgment of Conviction of each of the appellants be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U.S.A.
vs
Louis Toliver etc

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 28th day of May, 19 76 I mailed _____ copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

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at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney Att: Roger P. Williams, Asst. U.S. Atty.

502 United States Courthouse, Buffalo, N.Y. 14202

Leslie R. Johnson

Sworn to before me this
28th day of May, 19 76

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19....